

# Rights of First Refusal and the Importance of Record Notice

Posted on [June 27, 2022](#) by [tiffany.dowell](#)

A right of first refusal can be a good way to ensure a person has an option to purchase property before it is sold to another. However, as the Amarillo Court of Appeals recently considered in *Mr. W. Fireworks, Inc. v. 731 Properties, LLC*, certain steps must be taken to ensure enforceability of this right.



## Background

Mr. W Fireworks, Inc. ("Mr. W") owns fireworks stands across Texas, New Mexico, and Oklahoma. One of its stands is on Soncy Road in Amarillo on land that it leased on May 17, 2017 from Billy and Joanie Ivy. The lease agreement contained a right first refusal clause stating, "Lessors (the Iveys) will give Lessee (Mr. W) first refusal should Lessors decide to sell." The lease expressly provides that all covenants run with the land.

Shortly after signing the lease with Mr. W, the Iveys sold the property to HD Exchange Holdings with a purchase contract signed May 26, 2017 and a closing on June 1, 2017. In the sale documents, the Iveys signed an affidavit expressly stating that no other parties occupied, rented, leased, resided on, or possessed any portion

of the property. The day after closing, on June 2, 2017, HD Exchange filed its General Warranty Deed. Mr. W was not notified of this sale.

Approximately three weeks later, Mr. W filed a “Memorandum of Lease and Restrictive Covenant” identifying its lease and right of first refusal.

In November 2017, HD Exchange conveyed the property to HD Projects. During both 2018 and 2019, Mr. W made payments to HD Exchange. Mr. W did not identify its right of first refusal or try to exercise it at this time.

In July 2019, HD Projects conveyed the property individually to its four members. In October 2019, the members conveyed the property to 731 Properties. At that time, Mr. W requested information about the sale of the land to 731 Properties. In April 2020, Mr. W. tried to exercise its right of first refusal. 731 Properties refused to sell the land to Mr. W pursuant to the right.

Mr. W filed suit against 731 Properties, HD Exchange, HD Projects, and the four individual members of HD Projects for breach of contract and specific performance. The HD defendants filed a motion for summary judgment contenting they were not bound by Mr. W’s right of first refusal because they had no actual or constructive notice of the option when they purchased the property. The trial court granted the summary judgment motion and dismissed Mr. W’s claims.

### **Appellate Court Opinion**

The appellate court affirmed the ruling on the right of first refusal, but reversed on the quasi-estoppel claim. [Read Opinion [here](#).]

#### *Right of First Refusals Generally*

A right of first refusal essentially allows its holder the right to purchase property on the same terms offered by or to another bona fide purchaser. Generally speaking, a right of first refusal requires the grantor to notify the holder of the right of the grantor’s intent to sell the property and offer the property to the holder on the same terms and conditions offered by/to a third party. The holder may then choose to purchase the property according to the terms of the right of first refusal and the third party’s offer, or decline to purchase and allow the owner to sell to the third party.

There are generally two claims made in a case involving a right of first refusal. First, if the property is sold by the grantor without first offering it to the right holder, that constitutes a breach of contract. If the property has already been conveyed to a third party, the holder can seek monetary damages against the grantor and specific performance against the third party. However, in order to recover against a third party, the third party purchaser had to have actual or constructive notice of the right of first refusal.

The court noted there was no question Mr. W had a valid and enforceable lease with a right of first refusal with the Iveys. The question, however, is whether that right of first refusal is valid and enforceable against the HD defendants. Mr. W argues that the right runs with the land, meaning it applies to the future landowners. Mr. W argues it submitted a written offer 16 days after it learned of 731's purchase of the land, and contends that it did not know of any earlier sales of the land.

### *Bona Fide Purchaser*

HD Defendants argue that they are protected by the "bona fide purchaser defense." This defense provides that a third-party interest in property is binding on a subsequent purchaser for value if it was duly recorded or the purchaser had notice of the interest. An unrecorded conveyance of an interest in land is void as to a subsequent purchaser who buys the property for valuable consideration and without notice. Notice may be record notice, actual notice, or constructive notice. A party's bona-fide-purchaser status may be transferred, meaning a purchaser from a bona fide purchaser takes good title even if that subsequent purchaser had knowledge of the third party's interest at the time of its purchase.

It is undisputed there was no record notice at the time HD Exchange purchased the property from the Iveys as Mr. W did not record his Memorandum of Lease until three weeks after the purchase. Further, there was no evidence presented that HD Exchange had any actual notice of Mr. W's right of first refusal. Thus, Mr. W is left to argue that HD Exchange had constructive notice because there was a fireworks stand present on the property at the time HD Exchange purchased the land. However, the court held that Mr. W's mere presence upon or possession of the land did not satisfy the criteria to show constructive notice. HD Exchange said they did note the stand on the property, but because the Ivey's executed the affidavit that

there were no leases or other interests on the property, they assumed it belonged to the Iveys. Thus, the court found that HD Exchange was a bona fide purchaser and, as such, was not subject to Mr. W's right of first refusal. As such, the subsequent defendant purchasers also took good title even though Mr. W had recorded its right of first refusal prior to their purchase.

### *Quasi-Estoppel Claim*

Mr. W filed an amended petition the day before the summary judgment hearing in this case, which added a quasi-estoppel claim. The defendants did not respond to or brief this claim as it was added the day before the hearing. Because the court accepted the amended petition adding the quasi-estoppel claim, and the defendants did not challenge that claim in their summary judgment motion, the trial court could not dismiss that claim. Thus, that single claim was reversed and remanded to the trial court for further proceedings.

### **Key Takeaways**

The most important lesson from this case is to ensure any interest in land is properly recorded in the deed records immediately. This is certainly true for rights of first refusal, but can also be important for other rights such as leases or easements. The only way to ensure notice to any and all third parties is to have these rights recorded in the deed records of the land. Here, had Mr. W recorded its Memorandum of Lease prior to the HD Exchange purchase, HD Exchange would not have been deemed a bona fide purchaser of the land.

Another important lesson that was not addressed by the court is to investigate when something changes or does not make sense with regard to your property. For example, Mr. W made lease payments to HD Exchange for two years. This seemingly should have seemed odd to both parties—Mr. W making lease payments to someone beside who it knew to be the owner of the land and HD Exchange accepting lease payments from a tenant with whom it was not involved in a lease agreement.